Supreme Court, U.S.
FILED
MAY 7 2002
CLERK

No. 01-1411

IN THE

Supreme Court of the United States

COMMONWEALTH EDISON CO.,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

REPLY BRIEF FOR THE PETITIONER

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May 7, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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REPLY BRIEF FOR THE PETITIONER

The Petition demonstrated that EPACT imposes the most severe retroactive exaction in this Nation's history, requiring a group of utilities to pay billions of dollars (and petitioner alone over $235 million) based on events that occurred decades ago. The fundamental injustice of this scheme is patent – the assessments (i) "are not premised upon any responsibility [by the utilities] for the contamination" (Gov't C.A. Br. 31) but rather finance an environmental clean-up necessitated by the government's own negligence, (ii) subsidize the government's self-interested sale of USEC, and (iii) fund a clean-up of thorium and uranium production sites (costing more than $400 million) unrelated to any conduct by the utilities. For its part, the *en banc* Federal Circuit's exceedingly lenient test for evaluating even "severely retroactive" exactions (Pet. App. 31a) has considerable significance beyond even this seminal case and the dozens of parallel challenges to EPACT pending in the lower courts because the Federal Circuit has claimed exclusive jurisdiction over innumerable challenges to retroactive legislation that inevitably will arise in the future.

The Solicitor General denies little if any of this. Instead, like the Federal Circuit, he defends EPACT's constitutionality principally by segregating petitioner's takings claim from its due process claim in an attempt to deprive this Court's judgment in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), of any force. But the government, by focusing on the disagreement between the plurality and Justice Kennedy in *Eastern Enterprises* over which clause of the Fifth Amendment was violated by the Coal Act, ignores the vital, common conclusion reached by a majority of the Court: that the Constitution requires careful scrutiny of severe retroactive exactions such as EPACT. Certiorari is essential in order to give effect to that holding. See Pet. 12-15. And review is warranted for several other reasons as well, including the undisputed conflict between the Federal Circuit's *per se*, two-part test under the Due Process Clause and decisions of other circuits adopting an "*ad hoc* and fact intensive" test (*United States* v. *Hercules, Inc.*, 247 F.3d 706, 722 (CA8 2001)). See Pet. 15-16, 22-29.

Because this Petition squarely presents the vital constitutional issues raised by the Federal Circuit's *en banc* decision sustaining EPACT, certiorari should be granted limited to Questions One and Two. The equally important contract issues raised by EPACT should be given full consideration by also granting certiorari limited to Question One in No. 01-1398, *Omaha Public Power District* v. *United States* ("*OPPD*"), and setting the cases for argument in tandem.

I. The Conflicts Created By The Federal Circuit's Legal Standard Warrant Review In This Court.

1. The EPACT assessment takes petitioner's property for public use without compensation, and this case in no way requires this Court to revisit the determination of five Justices in *Eastern Enterprises* that the Takings Clause does not apply to "a mere obligation to pay an undifferentiated amount of money" (contra BIO 13).[1] The BIO ignores the fact that the assessments not only are "measured by [petitioner's] property interest" (*Eastern Enters.*, 524 U.S. at 540 (Kennedy, J., concurring)) in the Separative Work Units it purchased but also attach as a matter of law to the uranium itself. See Pet. 13. The Solicitor General's response to the further fact that EPACT "takes" the discrete stream of money that the statute contemplates the utilities will attempt to recover from ratepayers is internally inconsistent. He maintains (at 15-16) that "the utilities are generally liable for EPACT assessments without regard to whether the assessments are passed on to consumers and without reference to the source of the funds used to pay the assessments," while contending on the very next page (at 17)

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[1] It bears noting, however, that there is nothing "contrived" (contra BIO 14) about holding that, just as the Takings Clause would apply to a governmental order that a utility surrender a $2.25 billion power plant for public use, so too it applies to EPACT's mandate that a discrete group of utilities forfeit a specific sum of $2.25 billion apportioned according to a distinct set of contracts to finance a particular governmental project. The government equally "appropriates private property interests to serve the public good" (*id.*) in both instances.

that no constitutional claim lies because EPACT "mandate[es] that a utility 'shall' be allowed to fully recover the special assessments from its ratepayers." The better view is that Congress envisioned that the utilities would be required to forfeit a specific stream of money to the federal government. On the Solicitor General's contrary view, the government may seize the value of any discrete fund of money at its whim, circumventing the Takings Clause through the obvious artifice of mandating that payment be made from general revenues.

2. The grounds for granting certiorari to review the Federal Circuit's *per se*, two-part test under the Due Process Clause are even stronger. From the outset, the government does not deny that the *en banc* Federal Circuit avowedly created a circuit split by rejecting the "*ad hoc* and fact intensive" inquiry of other circuits (Pet. App. 20a n.10 (rejecting *United States* v. *Hercules, Inc.*, 247 F.3d 706, 722 (CA8 2001))). See generally Pet. 16 (collecting cases).[2] The Petition (at 22-29) demonstrated that the Federal Circuit – by considering only the "benefit" received and the assessed party's expectations – assigns no weight to at least *seven* factors that decisions of this Court and of other circuits hold to be highly relevant. The conflict is so manifest that the Solicitor General is unable to offer any answer at all regarding at least four of these factors:

• In assigning no weight to the severity of the assessment – *i.e.*, how much money the government exacts – the decision below conflicts with *United States* v. *Hemme*, 476 U.S. 558 (1986), and Third Circuit precedent. See Pet. 24-25. The Solicitor General thus acknowledges in his factual recitation (at 5) that EPACT requires utilities to pay $2.25 billion, but then refuses to admit that this vital fact plays any part in the constitutional analysis. Manifestly, the size of the exaction is central to determining whether it is "proportionate" to the assessed party's experience and responsibility.

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[2] The BIO (at 18) addresses the conflict only with respect to the Takings Clause, apparently conceding it with respect to the proper test under the Due Process Clause.

• The Federal Circuit's test assigns no weight to the fact that an assessment is wholly retroactive, with the concomitant risk that it is targeted at an unpopular or captive payor. The EPACT assessments rest only on events that occurred long ago and do not apply to future enrichment contracts. This Court's principal precedents applying rationality review in this context, by contrast, involved the "retroactive *application*" (*PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717 (1984) (emphasis added)) of statutes that apply equally prospectively. See Pet. 26-27.

• Particularly important with respect to EPACT, the Federal Circuit's test deems the government's patent self-interest in imposing the assessment totally irrelevant. See Pet. 27-28. Notwithstanding the availability of "numerous options to finance the decontamination and decommissioning of uranium enrichment facilities" (BIO 4), Congress chose the one that maximized the profits from the government's sale of USEC. In refusing even to acknowledge that critical fact, the BIO ignores not only Justice Kennedy's reminder that heightened scrutiny applies to "the Government's self enrichment" (*Eastern Enters.*, 524 U.S. at 544), but also the manifest conflict between the decision below and such precedents as *United States* v. *James Daniel Good Real Property*, 510 U.S. 43 (1993), and *U.S. Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977), and its progeny, as well as decisions of the Ninth and Tenth Circuits. Nor does he dispute that, because this case arises from the enrichment contracts, it presents an ideal opportunity to resolve the still-unanswered question expressly left open by *National Railroad Passenger Corp.* v. *Atchison, Topeka & Santa Fe Railway Co.*: "whether an allegation of a governmental breach of its own contract warrants application of [a] more rigorous standard" under the Due Process Clause. 470 U.S. 451, 471 (1985). Accord Chamber *Amicus* Br. 15 (urging that certiorari be granted to decide "what level of scrutiny applies where Congress has legislated for its own benefit").

• The Federal Circuit's test assigns no weight to whether the statute provides the assessed party with any procedural protections (including particularly resort to a neutral judicial officer, as is true of CERCLA and was true in *Usery* v. *Turner*

Elkhorn, 428 U.S. 1 (1976)) or instead, like EPACT, leaves the exaction wholly in the hands of the Executive Branch, which as noted stands to profit considerably from it. Pet. 29 & n.22.

The BIO does briefly address three factors that the decision below holds irrelevant, but the government still provides no persuasive argument that the Federal Circuit's *per se* test can be reconciled with the decisions of this Court and of other circuits:

• The government (at 23) deems EPACT's extraordinary period of retroactivity – potentially reaching from the final payments in 2007 back to the 1950s and 1960s (contra *id.* (asserting without citation a period of thirty-three years)) – to be "less important." Not so: the very notion of "settled" expectations in this Court's retroactivity jurisprudence necessarily places considerable weight on that factor, and this Court's precedents confirm how important it is whether Congress employs "only a modest period of retroactivity." *United States* v. *Carlton*, 512 U.S. 26, 32 (1994). See also Pet. 23 (citing *Eastern Enters.*, *supra*; *McKesson Corp.* v. *Division of Alcoholic Bev. & Tob.*, 496 U.S. 18 (1990)). Other circuits, in square conflict with the *en banc* Federal Circuit's decision in this case, have followed this Court's precedents and "place[] *considerable weight* on the brevity of the period of retroactivity" (*Licari* v. *Commissioner*, 946 F.2d 690, 694 (CA9 1991) (emphasis added)). See generally Pet. 24 (collecting decisions from Second, Third, Fifth, Seventh, and Ninth Circuits). The Solicitor General fails even to attempt to articulate a single basis on which those decisions can be distinguished or any reason why the conflict does not merit review.

• The Federal Circuit's test holds it irrelevant whether the assessed party is responsible for the problem that Congress seeks to redress. See generally Pet. 25. The Solicitor General maintains that the *Eastern Enterprises* plurality "expressed no doubt that *receipt of a benefit* is a rational basis for the imposition of retroactive liability to address a societal problem associated with that benefit." BIO 25 (emphasis added). Not so. Both the plurality and Justice Kennedy focused on the fact that the coal operators in that case were not responsible for *creating* the employees' *expectation* of lifetime health benefits. See 524

U.S. at 530-31 (plurality); *id.* at 549 (Kennedy, J.). It is therefore critical that the government has conceded that the EPACT "assessments are not premised upon any responsibility [by the utilities] for contamination" (Gov't C.A. Br. 31) and furthermore that the utilities "had no control" (*Eastern Enters.*, 524 U.S. at 532 (plurality)) over the government's enrichment facilities. See also *infra* at 8 (addressing Solicitor General's reliance on "benefit" supposedly received by utilities).

• Although this Court's decisions have sustained retroactive legislation only in limited circumstances (see Pet. 25), the Federal Circuit's test holds that even the most severe exactions are appropriate in order to address any "societal problem" (Pet. App. 31a). The Solicitor General again offers only contradictions in asserting that retroactive legislation was required here: on the one hand, he maintains (at 18) that "it has long been understood that the enrichment process would leave a need for decontamination" while just three pages later he insists (at 21) that the "cost of decontamination was not anticipated at the time the government provided those enrichment services" and that the need for decontamination was a "'large, unrecognized societal problem[]'" (quoting *Yankee Atomic Elec. Co.* v. *United States*, 112 F.3d 1569, 1575 n.6 (1997), *cert. denied*, 524 U.S. 951 (1998)). The truth of the matter is that the need for decontamination has long been known (see J.A. 524-25; A.S.A. 282), such that the fixed-price contracts both (i) assigned those production costs to the government as the supplier, and (ii) created, in turn, a reasonable expectation on the part of utilities that the costs would not later be shifted onto them.

3. Of particular note, most of the just-cited considerations that the Federal Circuit held to be irrelevant distinguish this case from the decision on which the court of appeals and the Solicitor General principally rely – *Usery* v. *Turner Elkhorn*, 428 U.S. 1 (1975). The worker's compensation provision in *Turner Elkhorn*: (i) imposed nothing remotely approaching the multi-billion dollar liability at issue in this case; (ii) subjected the mine owners to liability because they were principally responsible for the miners' illnesses (as the result of the mine conditions), and thus "allocate[d] to the mine operator

an actual, measurable cost of his business" (428 U.S. at 19), in contrast to EPACT, which abrogates fixed-price enrichment contracts and ignores the government's responsibility for the pollution in question; (iii) was not purely retroactive but rather only had "some retrospective effect" (indeed, the statute's retrospective application was so minor that the government denied it occurred *at all*) (*id.* at 16 & n.14); (iv) was not a self-interested attempt to fill the government's own coffers, but rather only served to aid injured workers; and (v) provided substantial procedural protections to coal companies challenging their liability (*id.* at 10-12). And even *Turner Elkhorn* explicitly left open the constitutionality of requiring coal operators "to provide compensation for present employees whose disabilities may stem from exposure that was terminated before enactment of the Act" (*id.* at 16 n.15), a circumstance analogous to this case, in which EPACT's adoption long post-dates the government's enrichment services.[3]

Certiorari accordingly should be granted to resolve the conflicts created by the Federal Circuit's adoption of a *per se*, two-part test for evaluating retroactive exactions.

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[3] The Solicitor General's further reliance (at 24) on CERCLA's retroactivity is misplaced because no court has imposed liability under circumstances remotely similar to this case. The one case the government cites – *United States* v. *Monsanto Co.*, 858 F.2d 160, 173-74 (CA4 1998), *cert. denied*, 490 U.S. 1106 (1989) – involved liability of less than $2 million reaching back approximately one decade, and even then the court of appeals sustained the statute only because it "spread[s] the costs * * * among all the parties that played a role in creating the hazardous conditions." In a recent decision far more analogous to the facts here, the Ninth Circuit held that the "primary" customer of aviation fuel suppliers could not be held liable under CERCLA for hazardous wastes associated with production. The court ruled that the customer (there, the government) had no control over the production process and CERCLA liability did not extend to mere end purchasers of hazardous products. *United States* v. *Shell Oil Co.*, 281 F.3d 812, 822-26 (CA9 2002). This decision, like those cited in the Petition (at 21 n.17), establishes that even CERCLA does not impose the sweeping liability without regard to responsibility that is at issue here.

II. The Solicitor General's Arguments With Respect To The Two Factors That The Federal Circuit Held To Be Relevant Are Similarly Unavailing.

Because the standard adopted by the Federal Circuit fails to account for several vital considerations under the Due Process Clause (see *supra* Part I), the Solicitor General's defense of the court of appeals' conclusion that EPACT is not "severely disproportionate" to the "benefit" the utilities received and does not contravene the utilities' reasonable expectations is largely beside the point. But the government's argument is also wrong on the merits.

1. The Solicitor General opines (at 21) that EPACT is constitutional because utilities received the "benefit" of "below-market pricing" for enrichment services and of "avoid[ing] the even greater costs of" operating and decontaminating their own plants. Even the Federal Circuit did not accept those claims, recognizing that the actual facts are to the contrary. Indisputably, the government was the "world's highest priced" supplier of enrichment services and when faced with the prospect of losing business to foreign competitors as a result of its *above*-market prices, it responded by making firm promises to charge less. See Pet. 3; J.A. 533, 585. The alternative foreign suppliers would have been powerless to exact a retroactive decommissioning fee. The Federal Circuit accordingly concluded that the "benefit" received by the utilities was merely the enrichment services themselves. As the Petition demonstrated (at 10) and the Solicitor General does not dispute, that reasoning effectively describes *every* government contract.

Nor did the utilities even arguably receive a "benefit" from the thorium and uranium processing sites that are being cleaned up with more than $400 million from the EPACT fund. Not even the Federal Circuit accepted the Solicitor General's contention (at 24 n.11) that the utility assessments are not used for that purpose. The BIO's claim (at 24 n.11) that "the monies for cleaning up the thorium and uranium processing sites are to be drawn from the government's contributions to the Fund" is not reflected in the statutory scheme and is belied by testimony by DOE that spending from the EPACT fund is zero-sum. See

A.S.A. 180 (money spent on thorium/uranium sites reduces the amount available for remediation of the enrichment plants). The Solicitor General's argument thus reduces to the insupportable proposition that any assessment is valid no matter what its purpose so long as it is pooled with other money contributed by the government.

The government's further contention that the assessments are "proportionate" because they are measured by the enrichment contracts once again encompasses every government contract. More important is the fact that the assessments are not proportionate to the utilities' *responsibility* for the environmental contamination, which resulted only from the government's operation of its own plants. Nor did Congress determine "that the costs should be borne collectively by all of those entities whose uses of the enrichment services would have contributed to the contamination of the enrichment facilities, in proportion to the benefit the entity received from those enrichment services." Contra BIO 26. Even if the government's contributions accounted for its own use of the plants for military purposes, the statute assigns the government essentially no costs for its commercial enrichment, notwithstanding that it was only the government that controlled whether the plants were operated in an environmentally responsible fashion. See Comm. on Energy *Amicus* Br. 11-12 n.5. That scheme cannot be reconciled with even CERCLA's approach of allocating costs based upon "relative fault." Pet. 21; *supra* at 7 n.3.

2. Nor is there merit to the BIO's claim (at 22) that the EPACT assessments can be reconciled with the utilities' reasonable expectations because the enrichment contracts lacked a provision specifically promising that the government would not retroactively force the utilities to pay for decontamination. The Solicitor General's position is wrong as a matter of basic contract law: the parties understood that the government would incur an array of costs that were covered by the prices paid by the utilities. Settled law established that those prices also accounted for the risk – attributed to the government as the supplier – that further unexpected costs would arise. See *OPPD* Pet. 14 (citing *Spearin* v. *United States*, 248 U.S. 136 (1918)).

And the Solicitor General notably does not deny that his position eviscerates private parties' faith that their contracts can successfully assign costs to the government, for it is undisputed that government contracts (which generally are prepared by the government itself) *uniformly* lack the further guarantee against retroactive liability that both the Federal Circuit and the Solicitor General find critically lacking in this case. See *id.* at 17.

The Solicitor General's further recitation of the Federal Circuit's view that CERCLA and the common law of nuisance "telegraphed" (Pet. App. 23) the EPACT assessment (see BIO 22) was fully anticipated by the Petition. The decision below ignores this Court's expectations jurisprudence, which holds that such a dramatic premise of telegraphy must be "objectively reasonable." See Pet. 19. It furthermore conflicts with *Eastern Enterprises*, which rejected the government's contention that the history of worker's compensation legislation and the Court's own decision in *Turner Elkhorn* deprived coal companies of any expectation against retroactive liability. See *id.* 20. And the EPACT scheme differs significantly from the apportionment of liability under CERCLA. See *supra* at 7 n.3, 9; Pet. 21-22.

Finally, there is no substance behind the government's *ipse dixit* (at 18) that "the strict regulation of the industry put [utilities] on notice that they could be liable in the future for assessments like those at issue here." Legions of industries, including the coal industry in *Eastern Enterprises*, are "highly regulated." See Pet. App. 175a-79a. The more relevant point is that the only relevant regulations – those governing uranium enrichment – placed responsibility for that process exclusively in the hands of the government. See Pet. 20.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, certiorari should be granted limited to Questions One and Two and the case set for argument in tandem with No. 01-1398, *Omaha Public Power District* v. *United States*.

Respectfully submitted,

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